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I SAY IT'S SPINACH: CHARITABLE TRUSTS TO REMEDY MARKET FAILURES IN THE PERFORMING ARTS

Jeffrey G. Sherman*

I. INTRODUCTION

*Coaxing mother to skeptical
five-year-old daughter at the
dinner table:*

It's broccoli, dear.

Five-year old daughter:

I say it's spinach, and I say the hell with it.¹

To speak of the law of supply and demand in connection with art seems almost indecent. So captivated are we by the romance of the misunderstood genius whose works go unappreciated until a century after his death that we tend to forget the examples of Shakespeare, Rembrandt, Beethoven, Verdi, and Picasso—all of whom became hugely popular and successful during life—and presume that True Art cannot survive the rigors of the marketplace and that what survives the rigors of the marketplace cannot be True Art. When the general director of a small New England opera company laments—“you have to earn as much money as possible at the box office. Why don't we do modern operas? Because we can't afford to put on something that we know beforehand that nobody will come see.”²—we instinctively sympathize and think his goals admirable. Yet his words reveal a highly questionable longing to produce an opera that nobody will come see. Why on earth should we strive to gratify that wish?

Under the perfect, free market of classical economics, “[C]onsumers, rather than producers or the government, define the quality and value of products and services [I]f producers want to be successful, they must be responsive to consumers.”³ The phrase “market failure” refers to a condition in which

* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I should like to thank Sarah Harding and Lawrence Katzenstein for their suggestions and advice. I must also thank Nancy and Philip Hablutzel for introducing me to one of my most important sources within the Chicago Symphony Orchestra Organization. And I am grateful for the support of the Marshall D. Ewing Research Fund during the writing of this article.

¹ E.B. White, *Cartoon*, NEW YORKER, Dec. 8, 1928. Caption by E.B. White (drawing by Carl Rose).

² Steve Metcalf, *After 100 Years, Concertgoers Still Resisting New Music; a Classical Conflict* HARTFORD COURANT, Aug. 14, 1994, at G1 (quoting George Osborne, general director of the Connecticut Opera).

³ M. Neil Browne et al., *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?*, 78 NEB. L. REV. 37, 44 (1999).

consumers, for some reason, no longer have that power,⁴ and performing arts producers and consumers must confront market failures on an almost daily basis. In the case of opera companies, for instance, the costs of opera production are so high and the number of available opera-lovers so low that if opera ticket prices were set at a high enough level to recoup all costs from the available opera-lovers, the number of opera-lovers willing to buy tickets would drop precipitously. Private philanthropy (and occasionally public subsidy) closes the gap by allowing the opera company to charge below-cost ticket prices. Because philanthropy has abated the market failure, the small number of opera-lovers are able to have their demand for live opera performance satisfied.⁵

Private philanthropy allows an opera company to ignore the preferences of the overall public, most of whom do not care for opera.⁶ But the opera director quoted earlier admits to a more ambitious goal: to ignore the preferences even of his customers, the available opera-lovers. In a sense, he wishes to *create* and exploit a rather specialized market failure. While opera companies are seldom able to create such a market failure and ignore their customers' preferences, symphony orchestras frequently can and do. In this Article, I shall discuss the nature of this orchestral market failure and how private philanthropy—using the trust arrangement—can provide a remedy.

⁴ *Id.* at 45.

⁵ See Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1428-30 (1991).

⁶ That private philanthropy should be necessary to sustain these activities is hardly new, and hardly a reason for begrudging them philanthropic support. So-called High Culture has always had a relatively small constituency. William Butler Yeats, for instance, once addressed a poem *To a Wealthy Man Who Promised a Second Subscription to the Dublin Municipal Gallery If It Were Proved the People Wanted Pictures*:

And Guidobaldo, when he made
That grammar school of courtesies
Where wit and beauty learned their trade
Upon Urbino's windy hill,
Had sent no runners to and fro
That he might learn the shepherds' will.

WILLIAM BUTLER YEATS, *THE COLLECTED POEMS OF W.B. YEATS* 105 (1967) (referring to Guidobaldo Montefeltro, who ruled as Duke of Urbino, in what is now Italy, from 1482 to 1508. During his regime, and that of his father's, the court of Urbino enjoyed a remarkable position as a haven of arts and letters, and Guidobaldo's court served as the stimulus and model for Castiglione's famous 16th Century handbook of gentlemanly "courtesies," *Il Cortegiano* [*The Courtier*]).

II. THE LAMENTABLE STATE OF MODERN “CLASSICAL” MUSIC⁷

Throughout the realm of the arts, The Modern has taken hold and triumphed. It has triumphed because people like it; it gives genuine pleasure. Nonrepresentational painting—which used to prompt gibes along the lines of “my 5-year old could do better”—has become so accepted that Joan Miró posters now adorn countless condominium walls, and the harrowing figure in Edvard Munch’s *Scream* has become a pleasantly familiar totem: even a camp one, not unlike Leonardo da Vinci’s *Mona Lisa*.⁸ In dance, abstract “absolute” choreography, such as Twyla Tharp’s, has become the prevailing drawing card, and old-fashioned narrative ballet is rarely admired or even seen, except for ironic takes on *Swan Lake* and seasonal confections like *The Nutcracker*. In theater, Samuel Beckett’s *Waiting for Godot*, which once seemed so remote and “difficult,” is now happily embraced by audiences as altogether accessible and even rather sweet. In all other areas of art as well—in architecture, in fiction, in design, in photography, in poetry,⁹ in sculpture—The Modern has become admired and popular. With one notable exception.

Modern “classical” music is the exception. People don’t like it. Of course, American audiences are far too cowed to hiss or snicker at the stuff,¹⁰ but they do allow themselves to show their displeasure by sitting stonily through the performance and, with perfunctory applause, calling the conductor back for only two bows instead of the customary three. Audiences that endure the Webern or the Xenakis or the Penderecki expect to be rewarded for their forbearance by a dollop of Beethoven or Tchaikovsky dispensed at the end of the program. If the modern piece were programmed for *after* intermission, much of the audience

⁷ Throughout this Article, I make frequent mention of the Chicago Symphony Orchestra. I do so because it is the orchestra with which I am most familiar and in which I have the most “sources;” but I have no wish to single it out for particular condemnation. It is a superb orchestra, with an extensive range and with splendid players committed to making music in the grand manner. On the other hand, I have no reason to suppose that the Orchestra’s programming policy is unrepresentative.

As to the matter of my “sources,” I have relied for some information on conversations with two important members of the Chicago Symphony Orchestra. Because members of the Orchestra may be bound by a no-disparagement clause in their contracts, I am obliged to protect their identities. Accordingly, I shall merely identify them collectively as Deep Note.

⁸ See Kathleen Connolly Butler, *Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public Domain Through Copyrights in Photographic and Digital Reproductions*, 21 HASTINGS COMM. & ENT. L.J. 55, 64 (1998). *The Scream* is hardly nonrepresentational, of course, but its fevered subjectivity puts it quite outside the photorealistic tradition.

⁹ Rhyme rarely appears in modern poetry except in aid of humor, and metrical verse like Robert Frost’s (d. 1963) now seems far more remote and old-fashioned than the free verse of Walt Whitman (d. 1892).

¹⁰ Some years ago, I attended a performance of a stupifyingly tiresome opera by Luciano Berio called *Un re in ascolto*. Midway through the first act, a gentleman in the audience began to laugh. It was a jarring, mirthless laugh that could not have been prompted by any merriment on stage, so I can only assume he was expressing his contempt for the work. The episode was as exhilarating as it was novel.

would be out hailing taxis before the first modern note was sounded.¹¹

Why is that? Why, when The Modern has been embraced in all other areas of the arts, is modern classical music still resisted after all these years? The answer is as simple as it is obvious. Modern classical music is lousy. You know it's lousy. I know it's lousy. The players certainly know it's lousy.¹² And music directors—who cynically program it for *before* intermission—know exactly how we all feel.¹³ At least contemporary rock and hip hop, despite their stunted musical vocabulary,¹⁴ deploy rhythm and attitude to hold the listener's attention. Can the same be said of the works of Elliott Carter?

"[M]usical consonance is still felt as a pleasant sound. But the abuse [i.e., overuse] of dissonance, and generations of light-hearted tampering with key-relationships, have robbed dissonance of its tonal properties of tension and suspense; and left it merely a tiresome ugliness."¹⁵ Even when Beethoven is

¹¹ One critic recently noted, and sniffed disdainfully at, "the not insignificant number of people who left at intermission at the concert last week, before [pianist Maurizio] Pollini played the Boulez." Charles Michener, *The Panoramic Pianist*, THE NEW YORKER, Apr. 3, 2000, at 82.

¹² See text at *infra* note 33.

¹³ See HENRY PLEASANTS, *THE AGONY OF MODERN MUSIC* (1955). The conductor is "part" of "the conspiracy." *Id.* at 7. "There is Beethoven on one side to make sure that the audience comes in. There is Brahms on the other side to make sure that it does not get out until the modern composer sandwiched in between has been heard." *Id.*

Some years ago, when a Chicago Symphony Orchestra conductor scheduled a Beethoven symphony to be performed after a late Twentieth Century concerto, the soloist for the concerto asked the conductor to schedule the symphony before the concerto. The conductor declined, saying, "Once the audience has heard the Beethoven, they won't want to hear the concerto." Deep Note, *supra* note 7.

Chamber music groups often make the same cynical programming decisions. The Pacifica [String] Quartet, when they were Artists-in-Residence at the University of Chicago, offered three concerts for the 2001-2002 season. Their first program comprised works by Beethoven, Brahms, and Roberto Lombardo (a world premiere); the Lombardo piece was sandwiched in between. Their third program comprised works by Haydn, Dvorák, and Elliott Carter; you can guess which piece was in the middle. (Their second program comprised only two works, and, *mirabile dictu*; both were early 19th Century masterpieces: one by Beethoven and one by Schubert.)

Henry Fogel, President of the Chicago Symphony Orchestra Association, made a surprisingly incriminating statement when he explained his prediction that CSO audiences would enjoy a particular symphony by contemporary composer George Lloyd: "[The symphony] is old-fashioned in a way, because Mr. Lloyd happens to believe in writing music with tunes." Lewis Lazare, *No State Fright Here: CSO Adds More Modern Music*, CRAIN'S CHICAGO BUS., Nov. 7, 1998, at 47. Think of the implications of that statement: Writing tuneful music is old-fashioned! It follows, then, that the truly forward-thinking composer avoids tunes.

¹⁴ See MARK STEYN, *BROADWAY BABIES SAY GOODNIGHT: MUSICALS THEN AND NOW* 208 (1999).

¹⁵ PLEASANTS, *supra* note 13, at 102. Nietzsche spoke admiringly of the artist who, unlike most modern classical composers, chooses to impose upon herself the constraints and conventions of earlier artists, the better to prove her artistic mettle. He termed this disciplined creativity "dancing in chains."

With every Greek artist, poet[,] and writer[,] one has to ask: what is the *new constraint* he has imposed upon himself and through which he charms his contemporaries (so that he finds imitators)? For that which we call "invention" (in metrics, for example) is always such a self-imposed fetter. "Dancing in chains", making things difficult for oneself and then spreading over it the illusion of ease and facility—that is the artifice they want to demonstrate to us.

boring (and his *Missa Solemnis* is—let's face it—boring), his craftsmanship, his command of counterpoint, his emotional involvement, his harmonic gift, and his intense apprehension of beauty shine through.¹⁶ Can the same be said of the work of Phillip Glass? John Lennon and Paul McCartney's "Hey, Jude" and the film scores of Bernard Herrmann¹⁷ far surpass in beauty and appeal anything written for the concert hall by Leon Kirschner or Ingvar Lindholm. Verdi's operatic treatment of Shakespeare's *Othello* arguably improved on the Englishman's work, while recent performances of William Bolcum's opera *A View from the Bridge* (based on Arthur Miller's 1955 play by the same name) and Marc Biltzstein's *Regina* (based on Lillian Hellman's 1939 play, *The Little Foxes*), though beautifully sung, left me pining for the nonmusical originals.

At the beginning of the current century, National Public Radio ("NPR"), after polling the public at large and consulting with a panel of professional musicians, compiled a list of the 100 "most important" American musical works of the Twentieth Century.¹⁸ Of these 100 works, only eight are arguably "classical:"¹⁹ Samuel Barber's *Adagio for Strings*; John Cage's *4:33*;²⁰ Aaron Copland's *Appalachian Spring*; George Gershwin's *Porgy and Bess* and *Rhapsody in Blue*;

Already in Homer we can perceive an abundance of inherited formulae and epic narrative rules *within* which he had to dance: and he himself created additional new conventions for those who came after him. This was the school in which the Greek poets were raised: firstly to allow a multiplicity of constraints to be imposed upon one; then to devise an additional new constraint, impose it upon oneself and conquer it with charm and grace: so that both the constraint and its conquest are noticed and admired.

FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN. (Volume II of this work, which was published some time after Volume I, contained a section entitled *The Wanderer and His Shadow*. The quoted passage is paragraph 140 of *The Wanderer and His Shadow*. This appears on page 343 of an edition of HUMAN, ALL TOO HUMAN translated by R.J. Hollingdale, 1986. Some Nietzsche scholars cite *The Wanderer and His Shadow* as a separate work, rather than as part of *Human, All Too Human*).

¹⁶ Beethoven takes care to suit the music to the text. *Credo in unum deum* is set to a confident march; *Osanna in excelsis* is an explosion of choral jubilation. Modern composers are seldom so conscientious. In Hindemith's *Mass*, for example, there is little observable difference in tone between his setting of *Crucifixus* and his setting of *Et resurrexit*. The words might just as well be "la la la:" a mere assortment of syllables pegged to his notes.

¹⁷ Today, the late Mr. Herrmann is perhaps best remembered for the harrowing instrumental shrieks he devised for Alfred Hitchcock's *PSYCHO*, but his score for *THE GHOST AND MRS. MUIR* (20th Century Fox 1947) is one of the most allusive and ravishing ever to come out of Hollywood.

¹⁸ See *The 100 Most Important Musical Works of the 20th Century*, npr website, at www.npr.org/programs/specials/vote/voting.html (last visited on Feb. 6, 2001). By "most important," the compilers meant that "[b]y virtue of its achievement, beauty, or excellence, the work represents a milestone of American music in the 20th century." *Id.*

¹⁹ It is somewhat unfair to draw conclusions about the state of modern classical music in general from the state of modern *American* classical music in particular. America's contributions to musical literature have generally lain outside the classical realm. If NPR had compiled the 100 most important 20th Century German or Russian musical works, the classical percentage might have been considerably higher than eight.

²⁰ The piece consists of four minutes and thirty-three seconds of performance silence, which may be a provocative piece of theater but it displays absolutely no musical craft. Still, no one can complain that the work is overly dissonant.

Ferde Grofé's *Grand Canyon Suite* [you've got to be kidding, NPR!]; Steve Reich's *Drumming* [an early bit of minimalist foolishness]; and Igor Stravinsky's *Symphony of Psalms*.²¹ By way of comparison, consider eight other works in the NPR 100: Irving Berlin's *Alexander's Ragtime Band*; Max Freedman & James Myers's *Rock Around the Clock*; Joe Garland & Andy Razaf's *In the Mood*; George & Ira Gershwin's *I Got Rhythm*; Jerome Kern & Oscar Hammerstein II's score of *Showboat*;²² Willie Nelson's *Crazy*; Richard Rodgers & Lorenz Hart's *My Funny Valentine*; and Billy Strayhorn's *Take the "A" Train*. Taken as a whole, which group of eight is more genuinely a source of national pride? Which group of eight reveals more "beauty or excellence"?²³ Which group of eight would you rather listen to?

III. WHY ORCHESTRAS IGNORE THEIR CUSTOMERS' PREFERENCES

Now that we are all agreed that modern classical music is lousy, we must face the obvious question: Since this music is so incontestably meretricious, why do prominent musical organizations insist on playing so much of it?²⁴ Music

²¹ Stravinsky, though Russian-born, was living permanently in the United States when he composed it.

²² The list's compilers shift inconsistently between whole Broadway scores and individual songs from Broadway scores. Among the NPR 100 are not only the score of *Showboat* but also the scores of *A Chorus Line*, *Fiddler on the Roof*, *Guys and Dolls*, *My Fair Lady*, *Oklahoma!*, and *West Side Story*. Yet also among the 100 are individual songs from Broadway shows. "My Funny Valentine," for instance, is from the musical comedy *Babes in Arms*. Why wasn't the whole score of *Babes in Arms* listed? After all, it also includes "I Wish I Were in Love Again," "Johnny One-Note," "Where or When," and "The Lady Is a Tramp;" not bad for a single show. And the score of *A Chorus Line*, though admittedly more cohesive than the *Babes in Arms* score, contains only one song that has enjoyed any performance life outside the show—"What I Did for Love"—and that song, while quite good as an isolated pop number, is definitely not "of a piece" with the rest of the score. Indeed, as anyone who has seen the show will aver, in performance the song derails the plot instead of propelling it. (Of course, the same criticisms could be leveled at "O mio babbino caro" from Puccini's *Gianni Schicchi*.)

²³ See *supra* note 18.

²⁴ What do I mean by "so much of it"? During the 2000-2001 subscription season, the member orchestras of the American Symphony Orchestra League performed the Sibelius Violin Concerto a total of thirty-one times (seven different orchestras played the piece), while they played the Tchaikovsky Violin Concerto only twenty-one times and the Brahms Violin Concerto only twenty times. (These data came from the 2000-2001 *Orchestra Repertoire Report*, prepared by the American Symphony Orchestra League (on file with author).) Is the Sibelius really that much more welcome to audiences than the Tchaikovsky or the Brahms? The Barber Violin Concerto was performed nineteen times and the Berg Violin Concerto seventeen times. Are these two modern works really almost as much in demand as the Tchaikovsky and the Brahms? Shostakovich's Cello Concerto was performed fifteen times, while the Dvorák Cello Concerto—arguably the greatest in the repertoire—was performed only nine times. *Id.* Let me offer some aggregate statistics. During the 2000-2001 subscription season, the member orchestras performed compositions entitled "Violin Concerto" a total of 405 times. Of those performances, only 205 (barely half) were of works by well-liked, non-modern composers. *Id.* (I ignored compositions like Chausson's *Poème* for Violin and Orchestra that are not styled "violin concertos." I did count Vivaldi's *Four Seasons*, however, since each of the four components is itself a short violin concerto that is styled as such; but I

directors often stress the importance of “diversity” in programming;²⁵ a thoroughly disingenuous argument. Diversity *per se* is neither good nor bad; it is an entirely neutral attribute. Both a vacation in Provence and a bout with scarlet fever would broaden the diversity of my experiences, but I doubt they would have similar effects on the quality of my life. Two hours of silence in a concert hall would certainly increase the diversity of orchestral programming but I doubt it would do much to advance the cause of art. In the context of orchestral programming, “diversity” is code for “heavy emphasis on contemporary music.” Music directors, when they cry “diversity,” never seem to think of programming Girolamo Frescobaldi (1583-1643) or Michael Praetorius (1571-1621); it’s always Bartók or Carter. And in fact, current orchestral programming is not diverse at all. During the 2000-2001 season, the Chicago Symphony Orchestra (“CSO”), in its twenty Saturday evening subscription concerts, played three pieces by Stravinsky but not a single piece by Mendelssohn or Tchaikovsky; and in the following season, the orchestra played five pieces by Stravinsky but not a single piece by Schubert. And there was no Handel in either season.²⁶

Some conductors’ calls for diversity may simply mask their boredom with the standard repertoire. One can almost hear the complaints, “How many times can I conduct the *New World Symphony*?”²⁷ I find it hard to sympathize. If Yul Brynner can play the title role in *The King and I* 4,600 times in thirty-four years,²⁸ a symphony conductor—as a matter of professionalism if nothing else—ought to be able to find fresh aesthetic nourishment in a Dvorak symphony nine times in a decade.²⁹ And if he’s weary of the *New World*, the conductor can program Dvorak’s Sixth Symphony, an excellent work that is not often performed.³⁰ And if he’s weary of the Dvorak/Brahms/Schumann canon, he can try his hand at Goldmark’s *Rustic Wedding Symphony*. Takemitsu and Webern are not the only alternatives to war-horses. To be sure, programming contemporary music can reassure music professionals (and some listeners) that the vein of culture they have cherished has not yet been exhausted. And music directors, who tend to regard contemporary composers as fellow toilers in the musical trenches, often use their programming authority to subsidize them. But

counted *The Four Seasons* as only one composition, in view of the brevity of each component.)

²⁵ See, e.g., Robert Epstein, *Introducing Artists, New Audiences*, L.A. TIMES, Sept. 5, 1991, at Part F, page 5. “In certain planning rooms of the [Los Angeles] Music Center, talk of diversity is often heard more often than talk of Dvor[á]k.” *Id.* See also *infra* note 29 and accompanying text.

²⁶ Subscription brochures published by CSO. See Appendices I and II.

²⁷ Cf. Bill McLaughlin, *Shore and country music at WJRZ*, ASBURY PARK PRESS, Dec. 1, 1998, at B1. “How many times can you play Phil Collins or Hootie and the Blowfish without getting totally bored?” *Id.* (quoting the vice president of the radio station).

²⁸ *Newsmakers*, DETROIT NEWS, Nov. 16, 1999, at A2.

²⁹ I arrived at the number nine by assuming that the piece would be played at subscription concerts every three years and that there would be three subscription series each year at which any given piece would be played.

³⁰ During the 2000-2001 subscription season, the orchestras that are members of the American Symphony Orchestra League played Dvorak’s *New World Symphony* a total of thirty-four times, while the Sixth Symphony was played only nine times. *2000-2001 Orchestra Repertoire Report*, *supra* note 24.

audiences' continued exposure to unrelievedly ugly sounds is a heavy price to pay for these limited benefits.

The programming of new music brings notoriety and grant money to orchestras.³¹ An orchestra's consistently revelatory performances of Beethoven war-horses have too low a profile to arouse the interest of foundations, but would-be latter day Medicis and Habsburgs jump at the chance of linking their names with a new composition, regardless of the composition's quality. Mozart, alas, is no longer available for commissions, but dozens of underemployed living composers are.

[T]he numerous festivals of contemporary music, the grants, fellowships and commissions to contemporary composers . . . are evidence of decrepitude, not of vitality. If modern music had any real vitality, it would take its place normally within the framework of contemporary musical life and make its own way. It would not need special promotion to obtain grudging performance and tolerant attention.³²

When, in interviews, members of the CSO dismissed modern classical music as "junk," "[not] worth playing," and "sound effects with no content,"³³ the organization's Henry Fogel hastened to modern music's defense, saying in disagreement, "It's nice to play something different."³⁴ But Henry Fogel doesn't *play* anything in the Orchestra; he is the president of the CSO Association, responsible for finances. Modern music may be junk, but it does excite the fund-raisers. And without large gifts to the orchestra, "new music concerts would be on the . . . endangered list . . ."³⁵

In some ways, programming modern classical music is less risky artistically than programming 18th and 19th Century works. Audiences, not having heard these new works before and therefore having no basis for comparisons, are in no position to judge the *performance's* quality. Indeed, modern classical music often disguises careless playing. A wrong note struck in a Boulez composition will go unnoticed by the audience; an errant note in a Haydn symphony will generate gasps or giggles. Critics, too, are protected, for the new music is so empty of craft or personality that any observations they might make about it are safe from refutation. And it affords critics an opportunity to show that they are more widely cultivated than the rest of us. For example, *New Yorker* critic Alex North, writing of György Ligeti (whom he dubs—evidently without irony—"the greatest of Transylvanian composers"), informs us that Ligeti's music "shows the

³¹ Deep Note, *supra* note 7.

³² PLEASANTS, *supra* note 13, at 5.

³³ Lewis Lazare, *supra* note 13. "[A] recent study of Hollywood studio musicians suggested that the men [*sic*] who perform the background music for the movies found their work more creative and their working conditions freer than when they played in symphony orchestras." HERBERT J. GANS, *POPULAR CULTURE & HIGH CULTURE* 36-37 (1999) (citing ROBERT R. FAULKNER, *HOLLYWOOD STUDIO MUSICIANS* ch. 3 (1971)).

³⁴ Lewis Lazare, *supra* note 13. There's that hobgoblin "diversity" again.

³⁵ John von Rhein, *MusicNOW Backs Up Popularity; Skillful Playing Opens Contemporary Series*, CHI. TRIB., Oct. 2, 2001, at Tempo, p. 2.

influence of . . . the Masses of Johannes Ockeghem, the player-piano music of Conlon Nancarrow, the saxophone solos of Eric Dolphy, [and] the drumming of the Central African Republic. . . ."³⁶ Mr. North's inventory, though gratifyingly eclectic, reveals less about the composer than about the critic.

Today's classical music professionals display a dismissive contempt for their audiences and blame them for disliking modern classical music.³⁷ These professionals often characterize and defend the music as "challenging," with the faint implication that those who dislike it are simply unequal to a challenge.³⁸ (If you hosted a dinner party, and a departing guest characterized the food you served as "challenging," would you feel complimented?) Or they suggest that liking both Beethoven and Ligeti bespeaks a finer sensibility than liking only Beethoven, a doctrine that Oscar Wilde deftly repudiated: "[O]nly an auctioneer . . . can equally . . . admire all schools of Art."³⁹ Charles Ives even impugned skeptics' masculinity. Responding to a heckler at a performance of a Charles Ruggles composition, Ives shouted, "[Y]ou goddam sissy; when you hear strong masculine music like this, get up and use your ears like a man."⁴⁰ Gender semioticians should have a field day with that one.⁴¹

For a piquant mixture of arrogance and condescension, you cannot improve upon the words of Joyce Idema, director of marketing for the CSO, who has "a new stock answer to those subscribers who say they don't like modern music. We now say, 'Sit back and let it happen. Don't worry about it. It's only twenty minutes or half an hour of your life. You don't have to like it.'"⁴² Now there's a novel marketing strategy! Imagine a diner's reaction if, when he complained to the restaurant-owner that the chowder was cold, the owner replied dismissively, "Big deal. It's only the first course. You don't have to like it."

We have seen why music directors and their co-conspirators *want* to ignore customer preferences by programming lots of contemporary classical music that their audience dislikes. But how can they *afford* to do so? First of all, ticket sales account for less than half of an orchestra's income; a recent study by the American Symphony Orchestra League put that figure at about thirty-eight

³⁶ Alex Ross, *Ligeti Split; The Composer as Comedian*, THE NEW YORKER, May 28, 2001, at 134. Indeed, professional music critics are usually the most insistent boosters of modern classical music. See Lewis Lazare, *supra* note 13 (quoting Joyce Idema, Market Director of the CSO); see also Michener, *supra* note 11.

³⁷ See, e.g., Alan R. Andreasen, *Marketing or Selling the Arts: An Orientational Dilemma*, 15 J. ARTS MANAGEMENT 9 (1985). "In my experience, . . . it is more often the case that deep down the manager really blames the consumer for not being more appreciative." *Id.* at 14-15.

³⁸ John von Rhein, music critic of the *Chicago Tribune*, recently characterized the traditional orchestral repertoire as "easy, passive entertainment." John von Rhein, *Strings and Zings: Higher Ticket Prices and Empty Seats*, CHI. TRIB., June 10, 2001, at C1.

³⁹ Oscar Wilde, *The Critic as Artist*, in THE COMPLETE WORKS OF OSCAR WILDE, 1009, 1047 (1966).

⁴⁰ Richard Morrison, *Homage to a Great American Pioneer*, THE TIMES (LONDON), Jan. 22, 1996.

⁴¹ Today, at least, most listeners would be using their ears like women. Far more women than men attend the performing arts. See Brenda Gainer, *The Importance of Gender to Arts Marketing*, 23 J. ARTS MANAGEMENT, L. & SOC'Y 240 (1993).

⁴² Metcalf, *supra* note 2.

percent for all of the member orchestras in the 1999-2000 season.⁴³ The rest came mostly from charitable giving by individuals, foundations, and businesses, and consequently orchestras are inclined to be more attuned to what attracts giving—*big* giving, in particular⁴⁴—than to what attracts customers.

Second, orchestra managers and music directors have discovered that potential concertgoers regard attendance at classical music concerts as an indicium of high status⁴⁵ and regard orchestra subscriptions as a “status product.”⁴⁶ An orchestra’s customers do not make their purchasing decisions on the basis of the particular pieces offered as part of the subscription series.⁴⁷ During its 2000-2001 season, the CSO performed a total of fifty-two compositions in its two Saturday evening subscription series, of which only seventeen (i.e., barely thirty-three percent) were compositions that American

⁴³ See American Symphony Orchestra League, *Research and Statistics*, American Symphony Orchestra League website, at www.symphony.org/research/facts/index.html (last visited August 20, 2001). Chicago’s premier music critic gloated, “[A] decline in ticket sales is hardly going to hurt [the CSO, which has] an endowment of \$163 million and \$415 million in total assets.” von Rhein, *supra* note 38. (*The New York Times* reported the endowment figure as \$168 million. Allan Kozinn, *Several Orchestras in U.S. Are in Trouble Financially*, N.Y. TIMES, Oct. 25, 2001, at E1, E4.). The orchestra may have a chance to put Mr. von Rhein’s boast to the test, for less than four months later, he had to report that the orchestra posted a \$1.3 million deficit for fiscal 2001. John von Rhein, *For the Record, More Bad News for CSO*, CHI. TRIB., Oct. 5, 2001, at C2. And a \$2 million deficit is projected for fiscal 2002. Allan Kozinn, *Several Orchestras in U.S. Are in Trouble Financially*, N.Y. TIMES, Oct. 25, 2001, at E1, E4.

⁴⁴ The CSO’s senior vice president for marketing and development recently acknowledged, “Probably 50 percent of what we raise comes from 1 percent of our donors. . . . The big gifts have a disproportionate effect.” Howard Reich, *There’s a Crisis in Classical Music*, CHI. TRIB., Oct. 28, 2001, at C1. See also John von Rhein, *Where the CSO Went Wrong and What Can Be Done*, CHI. TRIB., Oct. 28, 2001, at C15 (stating that “to a certain extent, [the CSO] has allowed foundations to determine its agenda.”)

⁴⁵ See Richard A. Peterson & Albert Simkus, *How Musical Tastes Mark Occupational Status Groups in CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY* 152, 168 (Michèle Lamont & Marcel Fournier eds., 1992). (“Our results suggest that there is general agreement among Americans that classical music anchors the upper end of the taste hierarchy and thus constitutes cultural capital.”).

Life Magazine, in 1949, published a (slightly) tongue-in-cheek chart classifying various tastes (tastes in clothes, tastes in furniture, etc.) according to social status: High-Brow, Upper Middle-Brow (ouch!), Lower Middle-Brow, and Low-Brow. The chart was inspired in part by an essay by Russell Lynes, managing editor of *Harper’s Magazine*, published earlier that same year in *Harper’s*. According to the chart, fondness for the classic late 18th century and 19th century symphonic repertoire is strictly Upper Middle-Brow. High-Brows prefer Bach and earlier, and Ives and later. See MICHAEL KAMMEN, *AMERICAN CULTURE, AMERICAN TASTES* 95-100 (1999).

⁴⁶ Lazare, *supra* note 13 (quoting Joyce Idema, Marketing Director of the CSO).

⁴⁷ Paradoxically, although orchestras rely on subscriptions’ standing as a status product when they make their programming decisions, many music professionals persist in thinking that orchestras have an obligation to “democratize” their product. Music critic John von Rhein, remarked that orchestras must convince “young person[s] raised on music videos that there is more to music than Britney Spears and the Backstreet Boys,” and he implied that hipper programming is the way to do it. von Rhein, *supra* note 38. Why? one is tempted to ask. Cher did not attempt to revive her post-infomercial singing career by essaying Mozart’s *Exultate Jubilate*; why should orchestras dilute their already endangered musical brew with “Believe”?

audiences can be expected to enjoy.⁴⁸ For the 2001-2002 season, the figure rose to a still-pitiful thirty-five percent.⁴⁹ How often would you return to a restaurant if you liked only thirty-five percent of the dishes it served you? How often would you go out with a person if you enjoyed his or her company only thirty-five percent of the time? How often would you return to a beach resort if its weather was agreeable only thirty-five percent of the time?

To a large extent, it is the subscription format that insulates orchestras from market forces. The CSO sells most of its seats—certainly its most desirable seats—by subscription,⁵⁰ which requires customers to purchase tickets for up to ten concerts even if they really want to attend only three or four of them. For example, if a customer wished to hear Brahms's Fourth Symphony at a Saturday concert during the 2000-2001 season, she also had to purchase tickets to a concert that included Varèse's *Amériques*. Even though thirty percent of the house is empty at the CSO's less popular programs,⁵¹ most of the seats have nonetheless been sold, inasmuch as they belong to subscribers. In the absence of subscription insulation, orchestra management listens more attentively to the market. The CSO presents an annual series of outdoor summer concerts at Ravinia Park in the suburbs north of the city, tickets to which are sold only singly; customers can purchase tickets for just the specific concerts they want to hear and can readily avoid modern-heavy programs. While only thirty-three percent of the CSO's Saturday subscription programming for the 2000-2001 season represents pleasure-giving music, a substantial sixty-two percent of the CSO's offerings at Ravinia for the summer of 2001 fall into that category.⁵² The captive audience at subscription concerts is given far less of the music it likes than the free agents who attend Ravinia.⁵³

IV. THE PROPOSED CHARITABLE TRUST SOLUTION

We have seen that those in charge of orchestral programming (1) know perfectly well how audiences feel about modern music; (2) continue to program it despite their audiences' antipathy; and (3) have no financial incentive, at least at their subscription concerts, to bring their programming more into line with their

⁴⁸ See *infra* Appendix I. My counting method is admittedly crude, since I count both Beethoven's *Egmont* Overture and Bach's *St. John Passion* as one composition each. For a description of how I determine which compositions are enjoyable, see discussion *infra* Parts IV.A.1 and IV.A.2.

⁴⁹ See *infra* Appendix II.

⁵⁰ See Lazare, *supra* note 13. "More than 90% of each season's available seats are sold to subscribers [of the CSO]." *Id.* The marketing and administrative expenses associated with selling tickets by subscription are considerably lower than those associated with selling single tickets to those same concerts. von Rhein, *supra* note 38.

⁵¹ See von Rhein, *supra* note 38.

⁵² See *infra* Appendix III.

⁵³ The programming policies of the Boston Symphony Orchestra show a similar disparity between its regular subscription offerings and its summertime Tanglewood offerings. At its twenty-three Saturday evening subscription concerts during the 2002-2003, only twenty-nine percent of its offerings represent pleasure-giving music. See *infra* Appendix IV. At its 2002 Tanglewood season, the figure is sixty percent. See *infra* Appendix V.

customers' preferences. The obvious solution is to *give* them a financial incentive.⁵⁴ I shall discuss two trusts designed to provide such an incentive: (1) a somewhat mischievous trust that I call the "123 Trust;" and (2) a more sober and realistic trust that I call the "subscription series trust."

A. The "123 Trust:" A Mischievous Solution

The "123 Trust" (the meaning of whose name will be made apparent) is designed to disburse to a designated orchestra a certain sum of money each time the orchestra plays, at a subscription concert⁵⁵ in its home city, a "Qualified Work" by a "Qualified Composer."

1. "Qualified Composer" Defined

The term Qualified Composer is defined as (1) any "Western" classical composer born between the years 1673 and 1812, inclusive; (2) Brahms; (3) Dvorák; (4) Saint-Saëns; or (5) Tchaikovsky. The 1812 cutoff date, though admittedly arbitrary, is unambiguous and easily applied by a trustee, and it does effectively separate those composers who can be depended on to write rhythmic, tonal, diatonic, nondissonant, pleasing music from those composers who cannot. Included are such great and, dare I say it, diverse composers as: Bach, Mozart, Paganini, Beethoven, Schubert, Schumann, Rossini, Mendelssohn, Chopin, Liszt, and Berlioz. Specific exceptions are made for Brahms, Dvorák, Saint-Saëns, and Tchaikovsky because, although their styles cannot be mistaken for those of their predecessors, their harmonic and contrapuntal gifts, their sensuous musical language, and their adherence to traditional diatonic relationships consistently result in pleasing music.

The 1812 cutoff date is not perfect, even as an instrument for imposing my own personal tastes. It excludes some composers whose work I consistently like, such as Bizet and Reinecke; and it excludes particular compositions that I like: Copland's *El Salón México* and Poulenc's Piano Concerto, for instance, although Copland and Poulenc cannot be depended on to write pleasing music at all times. But the cutoff date does conveniently identify a group of composers about whom there is widespread agreement, and it does so in a manner calculated to enable the trustees to make all but incontrovertible eligibility determinations. Furthermore, it is hoped that the trust will attract the contributions of many like-

⁵⁴ One solution that must be rejected is the commissioning of living composers to write music in the 18th or 19th Century style. Contemporary composers very likely lack the necessary inspiration and technical skill to produce convincing pastiches of Mozart or Brahms, especially since such talents are not cultivated in the current musical milieu and such skills have not been valued by contemporary composers' teachers and colleagues. Besides, there is plenty of real Mozart and Brahms out there; we have no need to encourage the inferior works of epigones, whose music is almost certain to be less deeply felt than music written by those to whom the style came naturally.

⁵⁵ This reference to subscriptions concerts forms an essential restriction. The goal of both of these trusts is to induce the orchestra to alter its fundamental programming policy by including more "pleasing" music in its high-profile subscription concerts, which are attended by its core audience. I do not want to permit the orchestra to enjoy the trust's largesse by programming special, ill-rehearsed shadow concerts at which no one important is expected to show up.

minded individuals, so the category of Qualified Composers must not strike possible donors as a mere reflection of my personal likes and dislikes. Both Mahler and Wagner are excluded even though they could write pleasing music when they chose, because (1) they also wrote a good deal of music that is anything but pleasing; (2) there does not exist the same kind of consensus about their music as there is about Bach's or Mozart's; and (3) I do not believe that Mahler and Wagner compositions are underrepresented in today's orchestral concert offerings, when the number of performances of their works is measured as a percentage of each composer's output.

Attention must be paid to the question of "early music," which was written in a modal musical language before the diatonic scale became the *lingua franca* of Western music.⁵⁶ Many orchestra subscribers would find Guillaume Dufay (d. 1474) as remote as Webern. I chose the year 1673 to address this question; music written by composers born before 1673 is not allowable. That admits Vivaldi but excludes Corelli. Also, 1673 matches the 1873 that I use for my definition of Disqualified Composer.⁵⁷

2. "Qualified Work" Defined

Since the trust is to distribute a large sum of money whenever the orchestra plays a work by a Qualified Composer, a music director hostile to the trust's goals might attempt to outmaneuver it by programming a multitude of five-minute Mozart overtures and encore pieces and such. The concept of "Qualified Work" is designed to thwart such devices. To be a Qualified Work, a composition must possess two qualities. First, the piece must be at least 16 minutes long in performance.⁵⁸ Thus, although Beethoven's overture to *Egmont* and Rossini's overture to *William Tell* (both played in the 2001-2002 season) are by Qualified Composers, they are too short to be Qualified Works. The stringing together of a composer's short works into a sixteen-minute total—e.g., the medley of Mozart "Concert and opera arias and duets" programmed for the 2001-2002 season—does not result in a Qualified Work, either. But if the work has a performance time of at least seventy-six minutes (e.g., Bach's *St. John Passion* in the 2000-2001 season), it counts as two works.⁵⁹

⁵⁶ Qualified Composers employed modal styles occasionally; Brahms, for instance, used the Phrygian mode in the second movement of his Fourth Symphony.

⁵⁷ See *infra* note 67 and accompanying text.

⁵⁸ The test is not how long the performance takes at a particular concert, for that would permit the conductor to transmogrify a nonqualified work into a qualified work by slow conducting. The test is an objective one, based on the average performance time determined by looking at recordings of the work. Obviously, the trustees will have to be given some discretion here in determining whether a work is long enough to qualify.

⁵⁹ At the time of this writing, seventy-five minutes of music represents the maximum load that a single compact disk ordinarily bears. It seems to me that audiences have a right to expect more than one CD's worth of music at a subscription concert. If the trust were allowed to count Beethoven's Ninth Symphony or Brahms's *German Requiem* as two works each, it might seem to endorse the orchestra's lamentable practice of treating each of those compositions as enough nourishment for an entire concert.

Second, to be a Qualified Work, the composition must be either the composer's original instrumentation or something pretty close to it. No synthesized music. No woodwind arrangements of Beethoven symphonies, no matter who did the arranging. Robert Schumann's orchestration is, in places, rather inept, so conductors and composers routinely make adjustments to give a more balanced sound to his symphonic music. Schumann's symphonies remain Qualified despite such modifications. But Schoenberg's orchestration of Brahms's Piano Quartet in G Minor (programmed for the summer of 2001 at Ravinia) and Liszt's orchestration of Beethoven's *Archduke* Trio (programmed for the 2000-2001 season) are not Qualified.

3. The Distribution Standard

Applying these standards, we can determine that the CSO played eighteen Qualified Works by Qualified Composers at its Saturday subscription concerts during its 2000-2001 season and nineteen such works during its 2001-2002 season. Of course, the orchestra played these works at other subscription concerts besides the Saturday. For example, in the 2001-2002 season, the orchestra played Brahms's Second Symphony (a Qualified Work by a Qualified Composer) at three subscription concerts: Thursday evening, January 31, 2002; Friday afternoon, February 1, 2002; and Saturday evening, February 2, 2002. Under the trust, for purposes of determining the amount to which the orchestra was entitled, the orchestra would be deemed to have performed the piece three times: *i.e.*, it played three Qualified Works by a Qualified Composer.

Let us assume that the orchestra, left to its own devices, would play Qualified Works by Qualified Composers at subscription concerts in its home city a total of 69 times during any given season.⁶⁰ If the orchestra could be induced to raise that figure to 123, approximately sixty-two percent of its subscription programming would consist of Qualified Works by Qualified Composers.⁶¹ Accordingly, the trust instrument should provide that when the orchestra plays its 123rd Qualified Work by a Qualified Composer at a subscription concert in its

⁶⁰ This figure is an extremely crude approximation. I start with the assumption that the orchestra plays each program at an average of three different subscription concerts, so that any Qualified Work by a Qualified Composer that is included in a particular program will be performed, on average, three times during the season. During the 2001-2002 season, the orchestra performed at its two ten-concert Saturday subscription concerts a total of nineteen different Qualified Works by Qualified Composers. In addition, the orchestra played at other subscription concerts four Qualified Works by Qualified Composers that were not performed at either of the two ten-concert Saturday series: Bach's *Brandenburg* Concerti Nos. 1 and 6, Beethoven's Piano Concerto No. 4, and Tchaikovsky's Symphony No. 3 (*Polish*). That is a total of twenty-three different Qualified Works by Qualified Composers performed an average of three times each, for a total of sixty-nine.

⁶¹ I am assuming that—given the amount of time that musicians, however well compensated, are willing to devote to rehearsals and performance—the number of orchestral subscription concerts would remain constant. Consequently, an increase in the absolute number of Qualifying Works by Qualifying Composers would necessarily raise the percentage of programming devoted to such works.

The figure sixty-two percent comes from the CSO's 2001 Ravinia season. *See supra* text accompanying notes 52-53.

home city during a given subscription season, the trustees will distribute to the orchestral association a substantial sum of money: substantial enough to induce the orchestral management to pressure conductors to program more pleasing music. Since the CSO's annual operating budget for fiscal year 2000 was \$55 million,⁶² a figure of \$2.75 million (five percent of the budget) should be substantial enough to exert some influence. Indeed, such a figure would amount to more than twice the orchestra's deficit for fiscal year 2001.⁶³

The powers-that-be within the orchestra association might reject the trusts' money on such high-minded grounds as "We will not be dictated to" or "We will not be bribed" or "We, not a bunch of rich philistines, are the only fit judges of what music should be played."⁶⁴ Accordingly, the trust instrument should provide that if, at the end of a subscription season, the orchestra has failed to satisfy the 123-composition requirement, the trustees should thereupon apply that year's \$2.75 million to charitable uses that are consistent with the goals of the trust: *i.e.*, the encouragement of the study and performance of Qualified Composers' music. If, before the trust is actually established, a prospective donor has reason to suppose that the orchestral association will reject the money,

⁶² See von Rhein, *supra* note 38.

⁶³ See *supra* note 43.

⁶⁴ In 1995, Yale University famously returned a \$20 million gift from Texas oil baron Lee M. Bass after failing for several years to implement the program that the 1991 gift was intended to fund. Bass wanted to establish at Yale a program in Western Civilization in which eleven faculty members were to teach, but by the fall of 1994 the program still had not been established. The juiciest, though by no means the only, explanation for Yale's delay was the ideological opposition on the part of certain faculty members who regarded Western Civilization as already overemphasized in the Yale curriculum to the detriment of "material on the achievements of non-Western cultures—and that the evils of the West, particularly imperialist expansion, colonialism[,] and racism, should be emphasized as well." Anthony Flint, *Yale to Return \$20m Donation*, BOSTON GLOBE, March 15, 1995, at Metro/Region page 1. When Yale's failure to establish the program and hire additional teachers came to Bass's attention, he thereupon insisted, as a condition of the gift, that he have the right to approve the faculty members who would hold the Bass Professorships. Unwilling to cede such authority to an outsider, and perhaps relieved to have a nonideological ground for renouncing the gift, Yale returned Mr. Bass's money. Joye Mercer, *Yale's President Says University Was at Fault in Flap Over a Returned Gift*, CHRON. HIGHER EDUC., Nov. 14, 1997, at A44; Anthony Flint, *Yale to Return \$20m Donation*, BOSTON GLOBE, March 15, 1995, at Metro/Region page 1.

The orchestra association might refuse my trust's largesse out of concern for the orchestra's other fund-raising efforts, inasmuch as a sudden influx of cash could discourage other donors. As the result of a settlement reached with the Wallace-Reader's Digest Funds by the Attorney-General of the State of New York, large amounts of wealth that previously were administered by the foundation for the benefit of certain charities were turned over directly to those charities. The Metropolitan Opera received some \$92 million.

The transfers, while widely hailed by the institutions, may be a mixed blessing in some cases, with infusions of assets so great that the Metropolitan Opera, for example, will have to raise the \$200 million goal of its endowment campaign to avoid suddenly meeting it and losing potential private benefactors. Other recipients worried that news of the distribution might lead donors into thinking that their support was no longer necessary.

Ralph Blumenthal, *13 Institutions Obtain Control of Vast Bequest*, N.Y. TIMES, May 4, 2001, at 1.

she may be tempted to provide that it is the orchestral players personally, rather than the orchestra association, who are to receive the \$2.75 million in the event the 123rd Qualified Work by a Qualified Composer is reached.⁶⁵ The thought would be that the players, less willing than their employer to forgo the trust's largesse, would pressure management into altering its programming. The difficulty with this last approach is that the trust would then be relying on others to do its work for it and would, in the process, be asking vulnerable employees to put their jobs on the line and thereby foment conflict within the organization the trust is supposedly designed to benefit.

B. The "Subscription Series Trust:" A Practical Solution

The "123 Trust," although structured as a beneficent entity, is, in point of fact, calculated to shame the orchestra as much as enrich it.⁶⁶ The arrangement reminds the orchestra continually that money—not its vaunted high-minded aesthetic principles and sense of mission—drives its programming judgments. Thus, the trust almost begs to be repudiated by the orchestra. A less belligerent approach is more likely to succeed in influencing the orchestra's programming decisions.

As an alternative to the "123 Trust," I propose a "subscription series trust:" a trust that rewards the orchestra for devoting a particular subscription series to the performance of pleasing music. The "subscription series trust" also relies on the terms Qualified Composer and Qualified Composition as well as a new term: Disqualified Composer. A Disqualified Composer is any composer born after 1873⁶⁷ and any non-"Western" composer⁶⁸ whenever born. The "subscription series trust" will distribute \$2.75 million to the orchestra at the end of any season

⁶⁵ Some difficulties might be presented in identifying exactly which "players" were to share in that season's trust distribution. Some Baroque compositions, for instance, call for considerably less than the orchestra's entire complement of musicians. Some more modern pieces call for extra percussionists or brass players, in which case the orchestral association engages the additional musicians on a temporary basis. Deep Note, *supra* note 7.

⁶⁶ So long as the trust's income and corpus are put to uses that are charitable, the fact that the donor may have had a base or selfish motive in no way disqualifies the trust from treatment as a charitable trust. "It is the purpose for which the property is to be used, . . . not the motives of the testator that determines whether a trust is a valid charitable trust." *In re Estate of Robbins*, 371 P.2d 573, 576 (Cal. 1962); see also *In re Estate of Zahn*, 93 Cal. Rptr. 810, 814 (Cal. Ct. App. 1971) ("motivated by a desire to perpetuate the memory of named persons."); *Mass. Inst. of Tech. v. Attorney Gen.*, 126 N.E. 521, 524 (Mass. 1920); *In re Matter of Everson*, 52 N.Y.S.2d 395, 400 (App. Div. 1944), *aff'd mem.*, 64 N.E.2d 653 (1945); *In re McKee's Estate*, 108 A.2d 214, 233-34 (Pa. 1954).

In *Fire Ins. Patrol v. Boyd*, 15 A. 553 (Pa. 1888), a fire insurance company contributed to the formation of a nonprofit fire patrol, which was to help both insured and uninsured persons. The fact that the insurance company's generosity might have been motivated in part by a desire to reduce the company's fire claim losses had no bearing on whether the fire patrol was a legal public charity. "The money which is selfishly given to public charities does as much good as that which is contributed from a higher motive, and in a legal sense the donor must have equal credit therefore." *Id.* at 555.

⁶⁷ See *supra* note 56 and accompanying text.

⁶⁸ By "non-'Western' composer" I mean a composer who composes in a style other than the familiar Western style, regardless of the composer's country of birth.

during which the orchestra offers and plays a ten-concert subscription series on a Saturday evening where at least sixty percent of the music performed is composed by Qualified Composers and at which absolutely no music by Disqualified Composers is performed⁶⁹ (Bruckner, Debussy, Mahler, Rachmaninoff, Sibelius, Strauss, Wagner, and all “Western” composers born before 1673 are neither Qualified nor Disqualified; consequently, up to forty percent of the music in this series may consist of their works). This sixty percent figure is slightly less (i.e., slightly more lenient) than the sixty-two percent figure that the “123 Trust” targets; but such leniency is justified because, as compensation for the slightly fewer pleasing compositions, the “subscription series trust” bans all contemporary junk,⁷⁰ whereas the “123 Trust” would permit as much as thirty-eight percent contemporary junk.⁷¹

The subscription series trust must treat Nonqualified Works differently from the way the “123 Trust” treats them, since the “123 Trust” deals with absolute numbers while the subscription trust deals with percentages. A composition that lasts less than sixteen minutes in performance (or a transcription of another work) is ignored for purposes of determining whether the orchestra has performed Qualified music the requisite 123 times during a season. For purposes of determining whether the orchestra satisfies the sixty-percent test under the subscription trust, a fraction is calculated whose numerator is the number of performances of Qualified Works by Qualified Composers and whose denominator is the total number of performances of all works. A Nonqualified (i.e., short or transcribed) work by a Qualified Composer is ignored for both numerator and denominator purposes; a Nonqualified work by a composer who is neither Qualified nor Disqualified is ignored for numerator purposes but not for denominator purposes. For example, suppose, at a particular series of concerts, the orchestra plays the overture to Mozart’s *Le Nozze di Figaro* (a Qualified Composer, but the work is too short to be a Qualified Work), the Tchaikovsky Violin Concerto (a Qualified Work by a Qualified Composer), and the Mahler First Symphony (the composer is neither Qualified nor Disqualified, but the work is, Heaven knows, not short). That program is considered to comprise only two compositions (the Tchaikovsky and the Mahler), of which one (the Tchaikovsky) is Qualified; so the program is fifty percent Qualified. Suppose instead that the orchestra plays Sibelius’s *Finlandia* (a short work by a composer who is neither Qualified nor Disqualified), the Tchaikovsky Violin Concerto, and the Mahler First. That program is considered to comprise all three compositions,

⁶⁹ Since the trust will be doling out a substantial sum of money, it is imperative that the orchestra earn it by playing a substantial number of concerts; ten seems like a substantial number. The Saturday restriction is to ensure that this Qualified music makes its appearance at significant concerts: not at, say, a Monday matinee series.

⁷⁰ See *supra* text accompanying note 33.

⁷¹ In theory, the “123 Trust” bans contemporary junk only from the special ten-concert Saturday evening series; the orchestra would be free to fill its remaining concerts entirely with junk. As a practical matter, however, the orchestra’s emphasis on Qualified music in the special Saturday series is likely to spill over into other series, since it is uneconomic for the orchestra to spend precious (and expensive) rehearsal time on a composition that is going to be performed only once.

of which one is Qualified; the program is thirty-three and one-third percent Qualified. The purpose of this calculation rule is to encourage the orchestra, when choosing between a short piece by a Qualified Composer and a short piece by a composer who is neither Qualified nor Disqualified, to opt for the former.⁷²

V. ADMINISTRATIVE DETAILS

A. Duration and Size of the Trust

Both the “123 Trust” and the “subscription series trust” would constitute charitable trusts for common law purposes;⁷³ accordingly, each would be “exempt” from the Rule against Perpetuities and therefore could continue in existence for an unlimited time.⁷⁴ But these two trusts should not be designed to last in perpetuity. They respond to the current method by which classical music is performed and heard live, and while this method has changed little in the last 100 years, there is no telling what lies ahead. Perhaps the symphony orchestra as

⁷² The rule for compositions lasting seventy-six minutes or more applies for purposes of the subscription trust as well, and applies whether or not the composer is Qualified. *See supra* note 59 and accompanying text. Thus, both the Bach *St. John Passion* and Wagner’s *Tristan und Isolde* count as two compositions each.

⁷³ *See* Hoenig v. Lubetkin, 79 A.2d 278 (Conn. 1951) and *In re Futterman’s Estate*, 95 N.Y.S.2d 876 (Sup. Ct. 1950) for examples of cases declaring trusts for the encouragement or support of music to be charitable for common law purposes. If a trust is charitable for common law purposes, not only is it exempt from the Rule Against Perpetuities, it is also exempt from the rule requiring that there be definite beneficiaries to enforce the trust. 4A SCOTT ON TRUSTS § 375 (William Franklin Fratcher ed., 4th ed. 1987).

The fact that a trust satisfies the common law requirements of “charitable” does not mean that the trust is necessarily exempt from federal income tax pursuant to I.R.C. § 501(c)(3). The tax requirements of “charitable” are presumably stricter than the common law requirements:

Charitable trust law exists primarily to protect assets which [settlers] choose to devote to worthy causes. Trust law provides this assistance by creating rigorous enforcement mechanisms to police abuses of these socially worthy trusts (such as authorizing attorneys general to bring enforcement actions) and by exempting such trusts from some of the technical requirements that apply to ordinary trusts. Unlike ordinary trusts, charitable trusts need not have definite, identifiable beneficiaries [and] they may exist in perpetuity As a consequence of the limited resources required to meet these objectives of charitable trust law, it covers a far broader subject matter than is deserving of a tax exemption.

Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 335 (1991) (footnotes omitted); *see* WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 360 (2d ed. 2001) (“The definition of ‘charity’ for private law purposes is broader than the tax definition.”). It is quite clear, however, that a nonprofit symphony orchestra, or a nonprofit organization established to benefit that orchestra, is an “educational” (charitable) organization pursuant to I.R.C. § 501(c)(3) (2001). Treas. Reg. § 1.501(c)(3)-1(d)(3) Ex. (4) (2002).

⁷⁴ 4A SCOTT ON TRUSTS, *supra* note 73, at § 365 n.1. The same would be true in states that have adopted the Uniform Statutory Rule Against Perpetuities. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4(5), 8B U.L.A. 370 (1993). *See also* Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 930-32 (1999).

we know it will be replaced (Heaven forbid!) by a collection of synthesizers; perhaps technology will permit different persons in the same performance space to hear different compositions at the same time. Although judicial mechanisms exist for modifying the terms of a trust to take account of unforeseeable changes in circumstances,⁷⁵ these trusts are so much a product of their time that any modifications at all in the trusts' terms—other than, perhaps, a change from one orchestra to another—undoubtedly would undermine the settlors' purpose in establishing the trusts in the first place. Should there be substantial alterations in the way classical music performance is “delivered” to “consumers,” trust termination would be more consistent with that purpose than trust modification.

Accordingly, it is proposed that the trust be designed to terminate after ten years. (For simplicity's sake, I shall, for the remainder of this Article, discuss only the “subscription trust.”) The shortness of the term lessens the possibility of obsolescence. And it reduces the size of the corpus necessary to sustain the trust's work. If the trust had to distribute \$2.75 million every year in perpetuity, and the trust assets earned four percent net per year, a corpus of almost \$69 million would be required. If the trust had to last for only ten years, with the final \$2.75 million distribution carrying out the last remaining assets of the trust, an initial corpus of only about \$22 million would be required. Furthermore, the trust might not be needed in perpetuity; after ten years of providing its subscription audiences with the kind of music they crave, the orchestra association might be loath to give up the increased ticket sales generated by the popular programming, and audiences might be louder in their objections were there any orchestral backsliding.

What should be done with money remaining in the trust after completion of the ten-year term? The surplus is likely to be small, since the amount of the initial funding will be determined by calculating the amount of principal required so that the tenth payment will exhaust the remaining trust assets, but if the assets in fact earn more than the interest presumed when the necessary initial principal was calculated, some surplus will exist.⁷⁶ Accordingly, the trust instrument should require that any surplus remaining after the ten-year term be applied to charitable uses consistent with the goals of the trust.

B. Why a Trust Rather Than a Corporation?

A charitable organization may be established as either a trust or a corporation.⁷⁷ The choice of entity has no federal tax implications,⁷⁸ but structural considerations make the trust a better choice for these musical purposes. The trust form is inherently less flexible than the corporation, and that

⁷⁵ See *infra* Part IV.D.

⁷⁶ For example, if the \$22 million initial principal earns five percent net instead of the projected four percent, about \$1.2 million will remain in the trust after the tenth \$2.75 million distribution.

⁷⁷ See, e.g., Treas. Reg. § 1.501(c)(3)-1(b)(2); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 188 n. 135 (1997).

⁷⁸ Carolyn C. Clark & Glenn M. Troost, *Forming a Foundation: Trust vs. Corporation*, 3 PROB. & PROP., May-June 1989, at 32, 32.

very inflexibility is exactly what's wanted in this case. For example, the directors of a charitable corporation generally have the authority to "adapt to changing circumstances by amending the organization's governing documents to restate its purposes In contrast, trustees may not amend a trust instrument [l]or terminate a charitable trust without court approval unless given express authority to do so in the governing instrument."⁷⁹ The settlor or contributors to the subscription trust are likely to be suspicious of claims that changes in circumstances or "public taste" require a rethinking or expansion of the Qualified Composer category; they would be more comfortable with an organization that can be depended upon to adhere strictly to the original articulated standards. The "business judgment" and "good faith" standards of dealing, while they may excuse the conduct of a corporate director, do not excuse a trustee's failure to adhere to the standards imposed by the trust instrument.⁸⁰ Moreover, the founder of a charitable organization can maintain control more easily over a charitable trust than over a charitable corporation:

Most jurisdictions allow [a charitable trust to be administered by only] one trustee . . . , while multiple directors (often a minimum of three) are typically required for a non-profit corporation. . . . [U]nless trustees are given the power to resign and authority to select their successors in the trust instrument, such action may require court approval. . . . Directors of corporations, on the other hand, typically are given the authority to resign[,] and the mechanism for their replacement requires no court action.⁸¹

Trusts have other advantages as well, from the donor's point of view. They are less expensive to operate and require fewer formalities.⁸² Where, as here, the donor intends that the organization be dissolved in ten years, the trust is a more convenient form, inasmuch as a corporation is inherently a perpetual arrangement.⁸³ And neither the size of the trust (\$22 million, initially) nor the

⁷⁹ *Id.* at 33. The laws of some states, however, require the directors of a charitable corporation to obtain judicial approval before they may amend the corporation's charter to alter its purposes. *See, e.g.,* *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 756-58 (N.Y. 1985).

⁸⁰ *See, e.g., In re Estate of Martin*, 159 N.W.2d 660, 662 (Wis. 1968) ("[T]he good-faith argument . . . is not sufficient because a trustee should always act in good faith.").

⁸¹ *Clark & Troost, supra* note 78, at 33.

⁸² *Id.* at 33.

Almost uniformly, a trust can be maintained and operated with less attention to state law formalities than a charitable corporation. For example, while the trustees should meet periodically to conduct the activities of the trust, typically there is no requirement for formal annual meetings or annual reports in order to maintain the existence of the trust. The non-profit corporation, which is a creature of state statutes, generally is required to have annual meetings of directors and members, if any; it also must keep minute books and registers of members in order to maintain its legal existence.

Id.

⁸³ Judicial approval is often required before a charitable corporation may dissolve and distribute its surplus assets. *See, e.g., In re Multiple Sclerosis Serv. Org. of N. Y., Inc.*, 496 N.E.2d 861 (N.Y.

fact that multiple donors are contemplated is an impediment; a charitable trust, like a charitable corporation, may be quite large and may accept contributions from persons other than the nominal settlor.⁸⁴

C. Enforcing the Trust

When a settlor establishes a charitable trust, especially one as potentially controversial as the subscription trust, she is naturally concerned that the trustees might be prevailed upon to depart from her original directions regarding the distribution of funds. What steps can the settlor take to minimize the likelihood of trustee defiance? Unfortunately, the settlor of a charitable trust does not have standing, as a settlor, to sue to enforce the terms of the trust or enjoin a threatened breach.⁸⁵ This disability, which constrains the settlors of irrevocable noncharitable trusts as well,⁸⁶ is premised on the notion that the settlor has parted with her entire interest in the trust property and therefore is not financially hurt by the trustees' misapplication of the property. Although this view has been severely criticized,⁸⁷ and a few states have changed the standing rule by statute,⁸⁸ it remains true in most states that a charitable trust—whose beneficiaries necessarily are the public at large rather than the particular recipients of the settlor's largesse⁸⁹—may be enforced only by the state attorney-general, acting on the public's behalf,⁹⁰ or by trustees of the trust.

1986).

⁸⁴ See, e.g., *Bd. of Tr. of the Museum of the Am. Indian v. Bd. of Tr. of the Huntington Free Library and Reading Room*, 610 N.Y.S.2d 488, 490 (N.Y. App. Div. 1994).

⁸⁵ *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995 (Conn. 1997); *Three Bills, Inc. v. Parma*, 676 N.E.2d 1273 (Ohio Ct. App. 1996), *appeal dismissed*, 673 N.E.2d 138 (Ohio 1996). Nor do contributors to a charitable trust, by virtue of their status as contributors, have standing to sue to enforce the terms of the trust. See *Balluffi v. Montross*, 102 N.Y.S.2d 543 (N.Y. Sup. Ct. 1950); *McFarland v. Atkins*, 594 P.2d 758 (Okla. 1979).

⁸⁶ 3 SCOTT ON TRUSTS § 200.1 n.2. (William Franklin Fratcher ed., 4th ed. 1987).

⁸⁷ See, e.g., John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 664 (1995).

⁸⁸ See, e.g., WIS. STAT. ANN. § 701.10(3) (West 2001); UNIF. TR. CODE § 405(c).

⁸⁹

[T]he public or the community . . . is the real beneficiary of every charitable trust[, and the particular individuals who receive money] are the mere conduits of the social benefits to the public. . . . Thus if a trust is set up to aid the poor of the city of Yorkville, the community is the beneficiary in that there is a public interest in relieving poverty and distress, and the residents of that city who are from time to time selected to receive food, clothing and the like are not beneficiaries of the charitable trust but are merely the means through which the community receives benefits.

GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 363 (rev. 2d ed. 1991). See also *In re Estate of Freshour*, 345 P.2d 689, 695 (Kan. 1959) ("While the human beings who are to obtain advantages from charitable trusts may be referred to as beneficiaries, the real beneficiary is the public[,] and the human beings involved are . . . the instrumentalities from whom the benefits flow.").

⁹⁰ See *Delaware v. Florida First Nat'l Bank of Jacksonville*, 381 So. 2d 1075 (Fla. Dist. Ct. App. 1979); *Attorney Gen. v. Rochester Trust Co.*, 333 A.2d 718 (N.H. 1975); 760 ILL. COMP. STAT.

The attorney-general has so many duties that he cannot be counted on to prevent breaches of a charitable trust. One solution to the settlor's enforcement concerns is for the settlor to appoint herself trustee of the subscription trust.⁹¹ If she is concerned that she personally lacks the management or financial skills needed to administer the trust, she can appoint one or more co-trustees to share the burden. Even as a "minority" trustee, she would have standing to bring a suit to enjoin threatened breaches by the other trustees.⁹²

But thought must be given to the possibility that the settlor will die or become legally incapacitated while the trust is still in existence. On whom else can the settlor rely to guarantee that the trustees will continue to observe the terms of her original grant? The best and most obvious choice for this responsibility would be an alternate beneficiary. For example, the subscription trust might provide that for any year in which the orchestra fails to offer a subscription series consistent with the distribution requirements, that year's \$2.75 million distribution is to be made instead to some other specified charity, such as a music library, a university, or another orchestra. The settlor could then rely on the alternate beneficiary to police the trustees' actions, since such an alternate clearly would have a financial incentive to uncover any breaches of the trustees' duties of proper distribution and would have standing to maintain a suit to obtain the substitute distribution to which it is entitled.⁹³

D. Precluding "Cy Pres"

Things change. Sometimes these changes render a charitable trust obsolete because the trust's purposes can no longer or *should* no longer be fulfilled. The equitable doctrine of *cy pres* allows a court in these circumstances to modify the terms of the trust so as to bring the trust more into line with current realities.⁹⁴

Where property is given in trust for a particular charitable purpose, and it is impossible or impracticable to carry out that purpose, the trust does not fail if the testator has a more general intention to devote the property to charitable purposes. In such a case the property will be applied under the direction of the court to some charitable purpose

55/12 (2001). One court held that a settlor's reserved power to make limited amendments to the trust instrument effectively conferred upon him standing to bring certain suits for trust enforcement. *See Kerbow v. Frostburg State Univ. Found.*, 40 F. Supp. 2d 724, 727 (D. Md. 1999).

⁹¹ The fact that the settlor of a trust is also the sole trustee of a trust does not make the trust invalid (so long as the settlor is not also the sole beneficiary). 2 SCOTT ON TRUSTS § 100 (William Franklin Fratcher ed., 4th ed. 1987).

⁹² 4A SCOTT ON TRUSTS, *supra* note 73, at § 391 ("It is clear . . . that where there are several trustees, one of them may maintain an action against the others to enforce the trust or to compel the redress of a breach of trust."). *See Holt v. Coll. of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 936-39 (Cal. 1964) (Traynor, J.); *Richards v. Midkiff*, 396 P.2d 49 (Haw. 1964).

⁹³ *Tr. of Dartmouth Coll. v. City of Quincy*, 118 N.E.2d 89 (Mass. 1954).

⁹⁴ "The phrase 'cy pres' comes (but with the old Norman spelling) from the French 'si près que possible,' meaning 'as close as possible.'" *See Jeffrey G. Sherman, Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1325 n. 244 (1999).

falling within the general intention of the testator.⁹⁵

For example, in the case of *Hardy v. Davis*,⁹⁶ where a trust had been established to maintain a home for orphan children but subsequent improvements in general economic conditions reduced the number of children residing in the home to three, the court held that it would be proper to apply the cy pres doctrine to modify the trust to provide scholarships for orphan children instead of a residence for them.

Moreover, application of the cy pres doctrine does not require a change in circumstances. It can be applied to modify a trust that was impracticable from its very inception,⁹⁷ and it is the possibility of such an application that particularly threatens the 123 and subscription trusts. Consider the case of *United States on Behalf of U.S. Coast Guard v. Cerio*.⁹⁸ The testator in that case had bequeathed the residue of his estate to the United States Coast Guard Academy to establish a trust fund that would pay all of its income annually to the graduating cadet "who has attained the highest grade average in chemistry and physics while enrolled in the academy."⁹⁹ (The court held that the Coast Guard was the trustee, and the Academy was the beneficiary.¹⁰⁰) The Academy did not wish to accept the gift on those terms, because the annual income was so large (between \$65,000 and \$130,000 per year) that if that entire sum were made available to a single student, the trust would disrupt the Academy considerably. The Superintendent of the Academy testified that such an annual award

would (i) engender intense, unhealthy competition among cadets, (ii) spawn honor code offenses, (iii) distort the competition to major in the sciences at the expense of other majors, (iv) erode, if not destroy, the class and interpersonal relationships and esprit de corps so vital to the Academy's goal of instilling in cadets the value of teamwork and (v) serve to teach cadets, wrongly, that the reward for a job well done in a life of public service in the Coast Guard is cash rather than the personal satisfaction that comes from doing well one's duty as an officer.¹⁰¹

So the court applied the cy pres doctrine and modified the trust to provide for a larger number of smaller gifts to Academy cadets.

One can imagine, all too easily, that after the settlor's death the orchestra might prevail upon the trustees to seek cy pres modification by arguing that the "123 Trust" or even the subscription trust interfered with the conductor-musician "chain of command" and with the orchestra's role as an educator and formulator of public taste. In response to such an argument, a court might very well loosen the settlor's restrictions as to the kinds of music the orchestra must play to be entitled to trust distributions. To prevent the cy pres doctrine from being used to

⁹⁵ 4A SCOTT ON TRUSTS, *supra* note 73, § 399.2 at 489-90.

⁹⁶ 148 N.E.2d 805 (Ill. App. Ct. 1958).

⁹⁷ 4A SCOTT ON TRUSTS, *supra* note 73, at § 399.2 at 517.

⁹⁸ 831 F. Supp. 530 (E.D. Va. 1993).

⁹⁹ *Id.* at 534.

¹⁰⁰ *Id.* at 541.

¹⁰¹ *Id.* at 535.

subvert the settlor's intent, the trust instrument should spell out that intention unambiguously and designate a specific alternate gift in the event a court is persuaded that the trust, in its original form, would undermine the orchestra's institutional integrity. The cy pres doctrine is not applied if the trust instrument provides for a gift over to a second charity in the event the property cannot be used for the first specified charitable purpose.¹⁰²

VI. CONCLUSION

The late Virgil Thomson, whose legendary persnickiness almost atones for his deficiencies as a composer, once remarked that rugged and contemptuous criticism was the only antidote to the deadening of musical sensibility brought about by today's publicity and marketing machines.¹⁰³ Unfortunately, philanthropy has left the major orchestras impervious to criticism. A sharply focused *counterphilanthropy* is therefore required to impel the orchestral authorities to bring their programming more into line with the desires and demands of their audience. For under the current regime, modern composers and conductors are in reality writing and performing mostly for one another.

¹⁰² See, e.g., *First Church in Somerville v. Attorney Gen.*, 376 N.E.2d 1226 (Mass. 1978).

¹⁰³ PAUL FUSSELL, BAD 16 (1991).

APPENDIX I

The following compositions were performed by the Chicago Symphony Orchestra at its 19 Saturday evening subscription concerts during the 2000-2001 season. (I am excluding an unrepresentative "pops"-ish concert.) They are listed in order of performance. **Boldface** indicates that the composition is (1) by a Qualified Composer, and (2) not a transcription of another composer's work.

DEBUSSY:	<i>Prelude to the afternoon of a Faun</i>
BERIO:	<i>Sinfonia</i>
PROKOFIEV:	Symphony No. 5
STRAVINSKY:	Symphonies of Wind Instruments
STRAVINSKY:	<i>Symphony of Psalms</i>
JANÁČEK:	<i>Glagolitic Mass</i>
BEETHOVEN:	Symphony No. 6 (<i>Pastoral</i>)
WEILL:	Suite from <i>The Silver Lake</i>
WEILL:	<i>The Seven Deadly Sins</i>
DVORÁK:	Symphony No. 9 (<i>New World</i>)
VARÈSE:	<i>Amériques</i>
MOZART:	Flute and Harp Concerto
MOZART:	Violin Concerto No. 4 in D Major
MOZART:	Piano Concerto No. 24 in C Minor
ADÈS:	Chamber Symphony
BRAHMS:	Violin Concerto
SCHUMANN:	Symphony No. 1 (<i>Spring</i>)
MAAZEL:	<i>Symphonic Movement</i>
SIBELIUS:	Symphony No. 2
BEETHOVEN:	Overture to <i>Egmont</i>
BEETHOVEN/LISZT:	Andante Cantabile from <i>Archduke</i> Trio
BEETHOVEN/GIELEN:	<i>Grosse Fuge</i>
SCHOENBERG:	<i>Pelleas and Melisande</i>
MAHLER:	Adagio from Symphony No. 10
LISZT:	Piano Concerto No. 1
KURTÁG	<i>...quasi una fantasia</i>
SCHUBERT:	Symphony No. 8 (<i>Unfinished</i>)
FAURÉ:	Ballade
FRANCK:	Symphonic Variations
MILHAUD:	<i>The Creation of the World</i>
ANTHEIL:	Symphony No. 5 (<i>Joyous</i>)
BERLIOZ:	<i>The Trojans, Part I: The Fall of</i> <i>Troy</i>
MOZART:	Piano Concerto No. 26 in D Major
BRUCKNER:	Symphony No. 7
SIBELIUS:	<i>The Oceanides</i>
RACHMANINOV:	Piano Concerto No. 1

HOLST:.....	<i>The Planets</i>
COPLAND:.....	<i>Appalachian Spring</i> (chamber version)
CRAWFORD SEEGER:.....	<i>Rissolty Rossolty</i>
CHARLIE CHAPLIN:.....	<i>City Lights</i> (with film)
WAGNER:.....	Prelude and Good Friday Music from <i>Parsifal</i>
LISZT:.....	Piano Concerto No. 2
WAGNER:.....	<i>Siegfried Idyll</i>
DALBAVIE:.....	<i>Concertate il suono</i>
RAVEL:.....	Piano Concerto in G Major
BARTÓK:.....	<i>The Miraculous Mandarin</i>
MARTINU:.....	<i>Memorial to Lidice</i>
ROUSE:.....	Clarinet Concerto
BRAHMS:.....	Symphony No. 4
BEETHOVEN:.....	Violin Concerto
BERLIOZ:.....	<i>Symphonie fantastique</i>
BACH:.....	<i>Saint John Passion</i>

Seventeen out of fifty-two pieces; that's 33%.

APPENDIX II

The following compositions were performed by the Chicago Symphony Orchestra at its 20 Saturday evening subscription concerts during the 2001-2002 season. They are listed in order of performance. **Boldface** indicates that the composition is (1) by a Qualified Composer, and (2) not a transcription of another composer's work.

CARTER:.....	Cello Concerto
WAGNER:.....	Three orchestral selections from <i>Götterdämmerung</i>
MUNDRY:.....	Piano Concerto
WAGNER:.....	<i>Die Walküre</i> , Act I
KURTÁG:.....	<i>Stele</i>
BARTÓK:.....	Piano Concerto No. 1
STRAVINSKY:.....	<i>Pulcinella</i>
MAHLER:.....	Symphony No. 2 (<i>Resurrection</i>)
MOZART:.....	Concert and opera arias and duets*
MOZART:.....	Piano Concerto No. 20 in D Minor
BACH:.....	<i>Brandenburg</i> Concerto No. 5
MENDELSSOHN:.....	Violin Concerto
BOULEZ:.....	<i>Mémoriale</i>
BOULEZ:.....	<i>Livre pour cordes</i>
RAVEL:.....	<i>Daphnis and Chloë</i> , Suite No. 2
HAYDN:.....	Symphony No. 22 (<i>The Philosopher</i>)
PRIMOSCH:.....	<i>From the Book of Hours</i>
SHOSTAKOVICH:.....	Symphony No. 10

RAVEL:	<i>Valses nobles et sentimentales</i>
DUTILLEUX:	Symphony No. 2
POULENC:	Concerto for Organ, Strings, and Timpani
RAVEL:	<i>La Valse</i>
STRAVINSKY:	<i>The Card Game</i>
BEETHOVEN:	Piano Concerto No. 3
BRAHMS:	Symphony No. 2
IVES:	<i>Central Park in the Dark</i>
BEETHOVEN:	Symphony No. 2
HAYDN:	Sinfonia Concertante in B-flat Major
HARTMANN:	Symphony No. 6
SAARIHO:	<i>Du cristal</i>
MOZART:	Piano Concerto No. 27 in B-flat Major
DVORÁK:	Symphony No. 7
STRAVINSKY:	<i>Dumbarton Oaks</i>
MOZART:	Violin Concerto No. 2
STRAVINSKY:	Violin Concerto
MOZART:	Symphony No. 36 (Linz)
ROSSINI:	Overture to William Tell
LUTOSLAWSKI:	Cello Concerto
RIMSKY-KORSAKOV:	<i>Sheherazade</i>
BARTÓK:	Suite from <i>The Miraculous Mandarin</i>
PROKOFIEV:	Violin Concerto No. 2
BEETHOVEN:	Symphony No. 7
BERLIOZ:	The Trojans, Part 2: The Trojans at Carthage
HAYDN:	Symphony No. 6 (Le matin)
SCHUMANN:	Piano Concerto
TAKEMITSU:	<i>Requiem</i>
HAYDN:	Symphony No. 101 (The Clock)
BRITTEN:	<i>Pas de Six from The Prince of the Pagodas</i>
BRITTEN:	Symphony for Cello and Orchestra
BRITTEN:	<i>Sinfonia da requiem</i>
BRITTEN:	<i>Sea Interludes from Peter Grimes</i>
HAYDN:	Symphony No. 88
R. STRAUSS:	Oboe Concerto
STRAVINSKY:	<i>Petrushka</i>
DEBUSSY:	<i>Ibéria</i>
TAKEMITSU:	<i>To the Edge of Dream</i>
RODRIGO:	<i>Concierto de Aranjuez</i>
C. HALFFTER:	<i>Tiento y Batalla</i>

BACH:..... *Brandenburg Concerto No. 4*
BOULEZ:..... *Notations V and VI*
BRUCKNER:..... *Symphony No. 9*

*I arbitrarily count the Mozart aria selection as three works, to match the three works of Wagner performed earlier in the season.

Twenty-three out of sixty-five pieces; 35%.

APPENDIX III

The following compositions were performed by the Chicago Symphony Orchestra at 18 concerts during its summer, 2001, Ravinia season. They are listed in order of performance. **Boldface** indicates that the composition is (1) by a Qualified Composer, and (2) not a transcription of another composer's work. The Orchestra's "Gala Benefit" concert and a "pops" concert are excluded.

BOCCHERINI:..... *Cello Concerto in B-flat Major*
TCHAIKOVSKY:..... *Rococo Variations*
BRAHMS/SCHOENBERG:..... *Piano Quartet in G Minor*
BACH:..... *Orchestral Suite No. 2 in B Minor*
BEETHOVEN:..... *Violin Concerto*
BRAHMS:..... *Symphony No. 4*
MOZART:..... *Piano Concerto in D Minor*
SIBELIUS:..... *Violin Concerto*
DVORÁK:..... *Cello Concerto*
BEETHOVEN:..... *Symphony No. 1*
BEETHOVEN:..... *Piano Concerto No. 4*
BEETHOVEN:..... *Symphony No. 5*
VERDI:..... *Requiem*
SCHOENBERG:..... *Verklärte Nacht*
MENDELSSOHN:..... *Capriccio Brillante*
SCHUBERT:..... *Unfinished Symphony*
SCHUBERT:..... *F Minor Fantasy for Piano and Orchestra*
WEBER:..... *Overture to Euryanthe*
MOZART:..... *Piano Concerto in E-flat Major*
MOZART:..... *Double Piano Concerto in E-flat Major*
MENDELSSOHN:..... *Italian Symphony*
TCHAIKOVSKY:..... *Violin Concerto*
SHOSTAKOVICH:..... *Symphony No. 5*
LORENZ:..... *Centennial Commission*
BRUCH:..... *Violin Concerto No. 1*
DEBUSSY:..... *La Mer*
RAVEL:..... *Suite No. 2 from Daphnis et Chloë*
BRAHMS:..... *Violin Concerto*
STRAUSS:..... *Also Sprach Zarathustra*

BACH/WEBERN:	<i>Ricercare</i>
BERG:	Violin Concerto
MENDELSSOHN:	<i>A Midsummer Night's Dream</i>
MOZART:	Piano Concerto in A Major, K. 414
MOZART:	Symphony No. 39
MOZART:	Clarinet Concerto
MOZART:	Piano Concerto in C Minor
MAHLER:	Symphony No. 1
BRAHMS:	Piano Concerto No. 1
SCHOENBERG:	<i>Pelleas und Melisande</i>
GLINKA:	<i>Ruslan and Lyudmila Overture</i>
PROKOFIEV:	Piano Concerto No. 3
TCHAIKOVSKY:	<i>Pathétique Symphony</i>
SCHUMANN:	Cello Concerto
DVORÁK:	Symphony No. 9 <i>From the New World</i>
WAGNER:	<i>Tristan und Isolde Act II</i>
STRAUSS:	Oboe Concerto
MAHLER:	Symphony No. 5

Twenty-nine out of forty-seven pieces; that's 62%.

APPENDIX IV

The following compositions were to be performed by the Boston Symphony Orchestra at its 23 Saturday evening subscription concerts during the 2002-2003 season. They are listed in order of performance. **Boldface** indicates that the composition is (1) by a Qualified Composer, and (2) not a transcription of another composer's work.

VERDI:	<i>Requiem</i>
BEETHOVEN:	Symphony No. 6, <i>Pastoral</i>
STRAVINSKY:	<i>The Rite of Spring</i>
WEIR:	<i>Moon and Star</i>
RAVEL:	Piano Concerto in G
PROKOFIEV:	<i>Alexander Nevsky</i>
HENZE:	<i>Scorribanda Sinfonica</i>
MOZART:	Piano Concerto No. 21 in C
RACHMANINOFF:	Symphony No. 3
COPLAND:	Suite from <i>Appalachian Spring</i>
RAVEL:	Piano Concerto in D, for the left hand
SHOSTAKOVICH:	Symphony No. 6
SCHUBERT:	Overture and incidental music to <i>Rosamunde</i>
BRITTEN:	<i>Cantata misericordium</i> , for tenor, baritone, chorus, and orchestra
BRITTEN:	<i>Ballad of Heroes</i> for tenor, chorus, and

	orchestra
SCHUBERT:	Symphony No. 4, Tragic
ADÈS:	<i>Asyla</i>
SCHUMANN:	Symphony No. 4
DVORÁK:	Symphony No. 9, From the New World
HUMPERDINCK:	<i>Hänsel und Gretel</i>
BARTÓK:	Piano Concerto No. 2
STRAUSS:	<i>An Alpine Symphony</i>
SESSIONS:	Piano Concerto
HARBISON:	Symphony No. 3
BRAHMS:	Symphony No. 1
BACH:	Orchestral Suite No. 3
BACH:	Cantata No. 170, Vergnügte Ruh', beliebte Seelenlust
HAYDN:	Symphony No. 99
ELGAR:	Cello Concerto
MAHLER:	Symphony No. 1
CHADWICK:	Symphony No. 3
STRAUSS:	Four Last Songs
STRAUSS:	Suite from <i>Der Rosenkavalier</i>
BERLIOZ:	Overture to Benvenuto Cellini
MEYER:	Violin Concerto
WALTON:	Symphony No. 1
KIRCHNER:	Music for Orchestra II
SIBELIUS:	Violin Concerto
SCHUMANN:	Symphony No. 3, Rhenish
MOZART:	Symphony No. 35, Haffner
MOZART:	"Ch'io mi scordi di te...Non temer amato bene," Concert Aria, K. 505
MAHLER:	Symphony No. 4
BEETHOVEN:	Symphony No. 4
HARBISON:	<i>Requiem</i>
BERIO:	<i>Sinfonia</i> , for eight voices and orchestra
DEBUSSY:	<i>Jeux</i>
STRAVINSKY:	Suite from <i>The Firebird</i>
WAGNER:	<i>Siegfried Idyll</i>
SZMANOWSKI:	Violin Concerto No. 1
STRAUSS:	<i>Ein Heldenleben</i>
IVES:	<i>Three Places in New England</i>
MAHLER:	Songs from <i>Des Knaben Wunderhorn</i>
CARTER:	<i>Boston Concerto</i>
BARTÓK:	Suite from <i>The Miraculous Mandarin</i>
STRAVINSKY:	<i>Perséphone</i> , Melodrama in three

scenes

PROKOFIEV: *Chout*
 PROKOFIEV: *Classical Symphony*
 GUBAIDULINA: *New work*
TCHAIKOVSKY: ***Symphony No. 6, Pathétique***
 BARTÓK: *Dance Suite*
MOZART: ***Piano Concerto No. 20 in D minor***
DVORÁK: ***Symphony No. 7***

Eighteen out of sixty-two pieces; that's 29%.

APPENDIX V

The following compositions were performed by the Boston Symphony Orchestra at 18 concerts during its summer, 2002, Tanglewood season. They are listed in order of performance. **Boldface** indicates that the composition is (1) by a Qualified Composer, and (2) not a transcription of another composer's work. Several "gala" and "pops"-style concerts are omitted.

MAHLER: *Symphony No. 2, Resurrection*
 MENDELSSOHN: ***Symphony No. 4, Italian***
 MENDELSSOHN: ***Violin Concerto***
 RESPIGHI: *Fountains of Rome*
 RESPIGHI: *Pines of Rome*
 BERNSTEIN: *Overture to Candide*
BERLIOZ: ***Symphonie fantastique***
BEETHOVEN: ***Choral Fantasy***
ROSSINI: ***Overture to The Siege of Corinth***
 BOLCOM: *Lyrical Concerto, for flute and orchestra*
TCHAIKOVSKY: ***Symphony No. 4***
WEBER: ***Oberon Overture***
BERLIOZ: ***Les Nuits d'été for mezzo-soprano and orchestra***
TCHAIKOVSKY: ***Symphony No. 5***
BRAHMS: ***Piano Concerto No. 2***
 RAVEL: *Valses nobles et sentimentales*
 ELGAR: *Cockaigne Overture*
MOZART: ***Piano Concerto No. 20 in D minor***
MOZART: ***Requiem***
 DUKAS: *The Sorcerer's Apprentice*
 RAVEL: *Piano Concerto in G*
 RIMSKY-KORSAKOV: *Sheherazade*
BEETHOVEN: ***Violin Concerto***
 SHOSTAKOVICH: *Symphony No. 5*
BEETHOVEN: ***Symphony No. 8***
BEETHOVEN: ***Scena and aria, "Ah! Perfido"***
 SIBELIUS: *Luonnotar, for soprano and orchestra*

SIBELIUS:	Symphony No. 5
TCHAIKOVSKY:	<i>Capriccio italien</i>
TCHAIKOVSKY:	Violin Concerto
PROKOFIEV:	Symphony No. 5
DVORAK:	<i>Carnival Overture</i>
MOZART:	Piano Concerto No. 25 in C
DVORAK:	Symphony No. 7
SAARIAHO:	<i>Château de l'âme</i> , for soprano, eight female voices, and orchestra
BARBER:	Violin Concerto
SIBELIUS:	Symphony No. 2
MOZART:	Symphony No. 35, <i>Haffner</i>
BRUCH:	Violin Concerto No. 1
TCHAIKOVSKY:	Symphony No. 3, <i>Polish</i>
MOZART:	Symphony No. 39
MOZART:	Piano Concerto No. 17 in G
MOZART:	Symphony No. 36, <i>Linz</i>
ROSSINI:	Overture to <i>The Italian Girl in Algiers</i>
SCHUMANN:	Cello Concerto
ELGAR:	<i>Enigma Variations</i>
BEETHOVEN:	Symphony No. 9
Twenty-eight out of forty-seven pieces; that's 60%.	